published. The Clerk is directed to withhold issuance of the mandate in Appeal No. 05-5202, the direct appeal, until seven days after resolution of any timely petition for rehearing.[2] See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
John T. Haley
Deputy Clerk

*Chief Judge Michel is a judge of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

**Chief Judge Restani is a judge of the United States Court of International Trade, sitting by designation pursuant to 28 U.S.C. § 293(a).

***Senior District Judge Stafford is a judge of the United States District Court for the Northern District of Florida, sitting by designation pursuant to 28 U.S.C. § 292(d).

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[2]As No. 05-5130 is an original action filed in the United States Court of Appeals for the District of Columbia Circuit, no mandate will issue

No. 05-51 30, et. al., In re Rodriguez

MEMORANDUM

I. BACKGROUND

Isidoro Rodriguez ("Rodriguez") brought suit in the United States District Court for the District of Columbia on behalf of himself and his minor son, Isidoro Rodriguez- Hazbun ("Isidoro"), against the National Center for Missing and Exploited Children, et. al.,[3] alleging that the defendants conspired to deprive him of his constitutional rights under the First, Fifth, and Ninth Amendments and civil rights under 42 U.S.C. §§ 1985(3) and 1986 (2000) and are also liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 (2000). Among other relief, he sought money damages, costs, and attorneys' fees. He also petitioned for a writ of mandamus to "keep [Isidoro safe while in Colombia, assure access and unhindered communication with Isidoro, and to seek pursuant to

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[3]The defendants named in Rodriguez's original complaint include: the National Center for Missing and Exploited Children, Ernie Allen, Nancy Hammer, Guillermo Galarza, Proskauer Rose LLP, Warren L. Dennis, Susan Brinkerhoff, Miles & Stockbridge LLP, Stephen J. Cullen, Patrick H. Stiehm, Mary B. Marshall, Robert McCannell, Knute E. Malmborg, and John Does 1-20, in their individual capacity, the Office of Children Issues, the Office of Legal Advisor for Consular Affairs, U.S. Department of State, an unknown number of unnamed and unknown employees of the United States, in their official and individual capacities, the United States Department of State, and the United States of America. For simplicity, the named defendants are categorized herein as either "federal defendants" or "private defendants." Collectively, however, they are referred to as simply "defendants."

Isidoro's wishes and rights his immediate return to the United States." Compl. at p. 38. During the pendency of his case, Rodriguez filed an amended complaint, adding numerous additional defendants, including every court and the majority of judges who had ruled on his previous federal and state filings. He likewise moved to disqualify Judge Richard W. Roberts, the district judge assigned to his case, pursuant to 28 U.S.C. § 455 (2000).

The district court granted the defendants' motion to dismiss the original complaint under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Rodriguez v. Nat'l Ctr. for Missing & Exploited Children. et. al., No. 03-120, slip op. at 13 (D.D.C. Mar. 31, 2005). First, as to Rodriguez's constitutional claim, the district court held that the federal defendants are immune from suit based upon the doctrine of sovereign immunity. Id. at 19-20. It also held that the private defendants are not proper defendants under the Constitution, citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Id. at 21-25.

Second, the district court found that the United States did not waive its sovereign immunity for Rodriguez's tort claim. Id. at 31. It also observed that of all of the torts he alleged, Rodriguez presented only a claim for intentional infliction of emotional distress ("IIED")at the agency level, a prerequisite for litigating a tort claim under the FTCA. Id. at 32. The district court thus limited its consideration of Rodriguez's tort claim to this one cause of action and held that he failed to allege any facts showing outrageous conduct on the part of the remaining defendants, an essential element of an IIED claim. Id. at 34-35.

Third, the district court held that Rodriguez's civil rights claims against the federal defendants are barred by the doctrine of sovereign immunity. Id. at 36. As to the private defendants, the district court held that Rodriguez did not allege facts sufficient to show that the private defendants conspired to violate either Rodriguez's or Isidoro's civil rights based on a discriminatory animus directed at U.S. Hispanic males. Id. at 37-39.

Finally, since the United States District Court for the Eastern District of Virginia had issued an order requiring that Isidoro return to Colombia, the district court found that Rodriguez failed to show a "clear and indisputable" right to a writ of mandamus. Id. at 39. It likewise concluded that both Rodriguez's motion to disqualify and his amended complaint were "nothing more than a transparent attempt at judge-shopping and forum-shopping." Id. at 42. Consequently, the district court denied both the petition for writ of mandamus and the motion to disqualify and struck Rodriguez's amended complaint.

Because the original complaint was dismissed under Rule 12(b), the district court entered final judgment, dismissing the entire action. On May 23, 2005, Rodriguez timely appealed.

II. DISCUSSION

The appellees argue that summary affirmance is appropriate because the district court correctly held that even accepting Rodriguez's well-plead allegations as true, they did not engage in a conspiracy to deprive Rodriguez and Isidoro of their constitutional or civil rights or to commit a tortious act against either of them. Rodriguez responds by asserting that summary affirmance must be denied because "the ongoing

deprivation of [Rodriguez's and Isidoro's rights to impartial access to both federal and Virginia courts to seek redress of the ongoing obstruction with Rodriguez's substantive parental rights" violates the constitution and federal statute. Resp. for Appellees at 9. As Rodriguez and Isidoro have had ample access to the courts, Rodriguez's argument is unresponsive to the motion for summary affirmance. On the merits, he appears to assert that he and his son are being wronged, rather than why the trial court's dismissal or any other ruling constitutes reversible error.

A.

We conclude that the district court correctly found that the United States, its agencies, and officials are immune from suit under the doctrine of sovereign immunity as to Rodriguez's constitutional, tort, and civil rights claims. See United States v. Testan, 424 U.S. 392, 399 (1976). Here, Congress did not waive the United States's sovereign immunity with respect to Rodriguez's constitutional claim. See Clark v. Library of Congress, 750 F.2d 89, 103 n.31, 104 (D.C. Cir. 1984). Nor did Congress waive the United States's sovereign immunity with respect to Rodriguez's tort claim, see FDIC v. Meyer, 510 U.S. 471, 477-78 (1994), or his statutory civil rights claims, see Hohri v. United States, 782 F.2d 227, 245 (D.C. Cir. 1986). Consequently, the district court properly dismissed all Rodriguez's claims against the federal defendants for lack of subject matter jurisdiction.

B.

As to the private defendants, we address each cause of action in turn, beginning with Rodriguez's allegation of a civil conspiracy to violate Rodriguez's and Isidoro's

constitutional rights. We agree with the district court that the private defendants cannot be liable for such a conspiracy because they were not acting under the color of law. See Browning v. Clinton, 292 F.3d 235, 250 (D.C. Cir. 2002) ("Critical to a successful Bivens claim, of course, [the defendants] must have acted 'under color of [federal] authority.'" (quoting Bivens, 403 U.S. 388, 389 (1971) (alteration in original))). Rather, the private defendants acted as private entities. Indeed, Rodriguez's complaint, as the district court noted, does not even allege that any of the private defendants acted under color of law. As such, Rodriguez's constitutional claim against the private defendants was correctly dismissed by the district court for lack of subject matter jurisdiction.

With respect to Rodriguez's tort claim, he particularly alleges that the private defendants violated Isidoro's and his rights to the "society and companionship in the father/son relationship, access to the courts of the Commonwealth of Virginia, constitute an illegal shanghaiing of Isidoro from the United States, negligent supervision, intentional infliction of emotional distress, violation of freedom to petition the government, falsification of official documents, and an invasion of privacy." Compl. ¶141. Of these claims, the district court correctly noted that Rodriguez, pursuant to 28 U.S.C. § 2675(a) (2000), only presented his claim for intentional infliction of emotional distress to the United States Department of State, the appropriate administrative agency. See Compl. ¶ 142. His claim was denied in 2002, thus allowing the present tort claim. The district court also correctly found that Rodriguez's original complaint was devoid of any factual allegations reflecting egregious conduct, let alone outrageous or atrocious conduct, on the part of the private defendants. See Brownino, 292 F.3d at 248 (The tort of intentional infliction of emotional

distress"requires conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.") (quotations and citations omitted). We thus conclude that the district court properly dismissed Rodriguez's tort claim for failure to state a claim.

Finally, we conclude that the district court properly dismissed Rodriguez's civil rights claims against the private defendants for failure to state a claim. To prove a conspiracy in violation of § 1985(3), a plaintiff must show, inter alia that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993) (citations and quotations omitted). Here, even under the most liberal interpretation of the original complaint, Rodriguez did not allege any facts, which if true, would show that the private defendants conspired against either Rodriguez or Isidoro because they are Hispanic males living in the United States. In his original complaint, Rodriguez merely alleges: "Defendants conspired against Plaintiffs . . . based on invidious discriminatory animus against Rodriguez and Isidoro as U.S. citizens Hispanic men." Compl. ¶ 145. This allegation is merely a bald assertion; it plainly fails to connect the private defendants' alleged actions against Rodriguez and Isidoro with the latters' status as U.S. Hispanic males. Moreover, since a colorable claim under § 1985 is a prerequisite to a claim under § 1986, Mollnow v. Carlton, 716 F.2d 627, 632 (9th Cir. 1983), the district court properly dismissed Rodriguez's derivative § 1986 claim.

C.

The district court correctly denied Rodriguez's petition for a writ of mandamus. Pursuant to the Mandamus Act, 28 U.S.C. § 1361 (2000), a district court may grant mandamus relief if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002) (quoting N. States Power Co. v. Dep't. of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997)). Rodriguez cannot show a clear right to relief under any of the facts alleged in his complaint or reasonable inferences to be drawn therefrom. See Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 402 (1976) (citations and quotations omitted). On the contrary, as the district court noted, Isidoro presently resides in Colombia with his mother as a result of the order of the Eastern District of Virginia. See Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603 (E.D. Va. 2002), affirmed, Hazbun Escaf v. Rodriguez, 52 Fed. Appx. 207 (4th Cir. 2002). Rodriguez and Isidoro have had the opportunity to fully adjudicate the merits of their child custody dispute in court; they simply are dissatisfied and disagree with the result. Accordingly, the district court was correct in holding that Rodriguez could not show a clear and indisputable right to a writ of mandamus.

D.

The district court did not abuse its discretion when it denied Rodriguez's motion to disqualify the district judge or when it struck his amended complaint. As the district court noted, Rodriguez's amended complaint mirrored his original complaint with the addition only of new governmental defendants, including the United States

District Court for the District of Columbia and Judge Roberts, and new conspiracy-based causes of action. Notably, Rodriguez made his filings after the defendants filed a motion to dismiss the original complaint and after Judge Roberts declined to recuse himself from the case. In light of the chronology of events, we can only infer that Rodriguez sought to delay any decision on the defendants' motion to dismiss. We thus agree with the district court that Rodriguez's motion and his amended complaint reflect an improper attempt to forum-shop and judge-shop.

III. CONCLUSION

Accordingly, for the reasons set forth herein, the district court's judgment of dismissal is summarily affirmed.

United States Court of Appeals 0f for the District of Columbia Circuit

No-05-5130

Dated: August 1, 2005

In re Isidoro Rodriguez, Esq., and as Father and next of friend of his 16 year old son Isidoro Rodriguez-Hazbun, and Isidoro Rodriguez-Hazbun,

Petitioners

05-5202

Isidoro Rodriguez, Esq., Father Isidoro Rodriguez-Hazbun, a minor and Isidoro Rodriguez-Hazbun,

Appellants

v.

National Center for Missing & Exploited Children, et al.,

Appellees

ORDER

It is ORDERED, on the court's own motion, that the above cases be consolidated.

For the Court
Mark J. Lagger, Clerk
By s/_____
Linda Jones
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ISIDORO RODRIGUEZ, *et al.*,	:
	:
Plaintiffs,	: Civil Action
	: No 03-CV-00120
v.	: (RWR)
	:
THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, *et al.*,	:
	:
Defendants.	:
	:

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motion to dismiss [63, 65] be, and hereby are, GRANTED. The complaint is DISMISSED. It is further

ORDERED that the plaintiffs' motion for writ of mandamus [47] be, and hereby is, DENIED. It is further

ORDERED that plaintiffs' motions to disqualify [128, 132] ve, and hereby are, DENIED, and the amended complaint is STRICKEN., It is further

ORDERED that all remaining motions [120, 121, 130, 133] be and hereby are, DENIED as moot.

This is a final, appealable order

SIGNED this 21st day of March, 2005.

/s/

RICHARD ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISIDORO RODRIGUEZ, *et al.*,	:
	:
Plaintiffs,	: Civil Action
	: No 03-CV-00120
v.	: (RWR)
	:
THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, *et al.*,	:
	:
Defendants.	:
	:

MEMORANDUM OPINION

Isidoro Rodriguez ("Rodriguez") brought this lawsuit on behalf of himself and his minor son, Isidoro Rodriguez-Hazbun ("Isidoro") against a number of individuals, organizations, and agencies, alleging that these defendants conspired to deprive him of his constitutional rights and committed violations of the Federal Tort Claims Act. Plaintiffs also petition for a writ of mandamus directing the Department of State to keep Isidoro safe in Colombia, assure Rodriguez access to Isidoro, and seek Isidoro's return to the United States. The federal defendants have moved for dismissal of the complaint under Rules 12 (b) (1), (2), (4), (5), and (6) of the Federal Rules of Civil Procedure, alleging lack of subject matter and personal jurisdiction, insufficient process and service, and failure to state a claim, respectively. The private defendants have moved for dismissal pursuant to Rules 12 (b) (1) and 12 (b) (6).

In Counts One and Two, plaintiffs allege constitutional violations under the First, Fifth, and Ninth Amendments. Because plaintiffs have failed to serve process on the federal individual defendants in their individual capacities, and because these individuals are entitled to sovereign immunity from suits for money damages against them in their official capacities, the constitutional claims against these individuals will be dismissed. Because the federal organizations have sovereign immunity from suits for money damages, the constitutional claims will also be dismissed as to these defendants. Because the private organizations and some of the private individuals are not proper defendants under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the constitutional claims will be dismissed as to them. For the remaining individual private defendants, the constitutional claims will be dismissed as to them because, even if they are proper Bivens defendants, plaintiffs have not stated a claim against those defendants that would withstand qualified immunity.

In Count Three, plaintiffs allege a number of violations of the Federal Tort Claims Act. Because the United States has not waived sovereign immunity with respect to constitutional torts, because plaintiffs failed to present certain of their alleged non-constitutional tort violations at the agency level, and because, with regard to the alleged tort violation they did present at the agency level, they fail to state a claim upon which relief can be granted, plaintiffs' claims under the Federal Tort Claims Act must be dismissed.

In Count Four, plaintiffs allege, pursuant to 42 U.S.C. §§ 1985(3) and 1986, the existence of a conspiracy to violate their constitutional rights. Because plaintiffs fail

to sufficiently state a claim that any alleged conspiracy was based on racial or other class-based animus, plaintiffs' claims under these statutes will be dismissed.

Because plaintiffs have failed to show that their right to a writ of mandamus, which they seek in Count Five and in a separately filed motion, is clear and indisputable, the request to issue a writ of mandamus will be denied.

Finally, plaintiffs filed a motion to disqualify me, pursuant to 28 U.S.C. § 455 (b) (5) (I) , along with an amended complaint adding me, among others, as a defendant. Because plaintiffs' motion and amended complaint are merely a transparent attempt at judge-shopping and forum-shopping, the motion to disqualify will be denied and the amended complaint will be stricken in its entirety.

BACKGROUND

I. PLAINTIFFS AND PREVIOUS LAWSUITS

According to the facts alleged in the complaint, Rodriguez is an attorney admitted to the bar in Virginia who traveled to and resided in Colombia between 1987 and 1999. (Compl. at 28, 30.) He fathered a child, Isidoro, in 1989. (Compl. at 31.) Rodriguez subsequently returned to live in the United States in 1999. (Compl. at 34.) Isidoro and his mother, Amalin Hazbun Escaf ("Hazbun"), remained in Colombia. After Rodriguez moved to Virginia, Hazbun and Rodriguez agreed to have Isidoro visit his father in the United States on several occasions. Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603, 607 (E.D. Va. 2002), aff'd, Escaf v. Rodriguez, No. 02-487, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. Dec. 11, 2002), cert. denied, 538 U.S. 1000 (2003). Rodriguez claims that he had a right of

"visitation and right of access to Isidoro" based on a verbal divided custody agreement and written joint custody agreement he entered with Hazbun. (Pl.'s Omnibus Resp. at 4.)

Isidoro's third trip to visit Rodriguez in Virginia occurred during the months of June and July, 2001. Hazbun Escaf, 200 F. Supp. 2d at 607. On July 13, 2001, the day before Isidoro's scheduled return to Colombia, Rodriguez informed Hazbun that Isidoro would be remaining in the United States. Id. On the same day, Rodriguez filed a petition to modify the custody agreement between himself and Hazbun in the Juvenile and Domestic Relations Court of Fairfax County, Virginia. (Compl. Ex. 3a.) On August 15, 2001, Hazbun filed a Hague Convention Return Application with the Colombian Civil Authority, seeking Isidoro's return to Colombia under the Hague Convention on the Civil Aspects of International Child Abduction Act. Hazbun Escaf, 200 F. Supp. 2d at 607. Subsequently, on December 20, 2001, Hazbun filed a suit in the United States District Court for the Eastern District of Virginia seeking the return of Isidoro to Colombia under the Hague Convention, as implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601-11610. See Hazbun Escaf, 200 F. Supp. 2d at 608. Rodriguez alleges that the defendants "conspired to file [the Hague Convention action], seeking and causing the expeditious shanghaiing of Isidoro against his wishes. . . from the United States to Colombia." (Compl. SI 38.)

On May 6, 2002, United States District Judge T.S. Ellis, III, of the Eastern District of Virginia issued a memorandum opinion holding that Rodriguez's retention of Isidoro in the United States violated Hazbun's custody rights, that Isidoro was not in grave risk of harm, that Isidoro's stated desire to

remain in the United States did not bar his return to Colombia, and that ICARA and the Hague Convention required Isidoro's return to Colombia. See Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603 (E.D. Va. 2002). On December 11, 2002, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling and also concluded that "the proceedings in district court did not violate either Rodriguez's or Isidoro's rights." Escaf v. Rodriguez, No. 02-487, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. Dec. 11, 2002), cert. denied, 538 U.S. 1000 (2003).

Rodriguez subsequently filed the instant action alleging that various defendants conspired to deprive him and his son of their constitutional rights. II. FEDERAL DEFENDANTS

With regard to the following federal defendants, plaintiffs allege that each "ha[s] and continues to engage in a custom, policy, or practice of disregarding and thereby violating the fundamental rights of United States citizens vis-a-vis their application and administration of the [Hague] Convention." (Compl. SIS! 58, 77, 103.) Plaintiffs also claim generally that "Defendants employees and agents intentionally conspired to deprive Rodriguez and Isidoro to their rights to equal protection and due process in whole or in part because of their being Hispanic." (Compl. SIS! 59, 78, 104.)

A. United States Department of State, The Office of Children's Issues, Bureau of Consular Affairs

Plaintiffs allege that defendants Office of Children's Issues, Bureau of Consular Affairs, and the U.S. Department of State are the entities responsible for the administration of the Hague Convention and ICARA. (Corapl. SI 46.) The only specific act he alleges that these entities engaged in was

"assist[ing] in the filing" of Hazbun's Convention action on December 20, 2001. (Compl. SI 74.)

B. Mary B. Marshall

Defendant Mary B. Marshall, whom plaintiffs sue in her individual and official capacities, is an employee and director of the Office of Children's Issues of the United States Department of State. (Compl. 23.) Plaintiffs appear to allege that Marshall "assisted in filing" Hazbun's Hague Convention action. (Compl. SI 74.) Plaintiffs also allege that Marshall sent letters to Fairfax Family Court on January 3, 2002 and to Judge Ellis on March 15, 2002. (Compl. SI 75.) They claim that these letters violated 42 U.S.C. §§ 11603-11604 "by negligently seeking to circumvent" Rodriguez's family court action and by concealing information regarding Colombia. (Id.) Finally, plaintiffs claim that Marshall acted negligently by improperly authorizing the alleged conspiracy, allowing interference in Rodriguez's family court action, failing to train and properly supervise employees, and failing to assure access and communication between Rodriguez and Isidoro. (See Compl. SI 123.)

C. Robert McCannell, Knute E. Malmborg, Office of Legal Adviser for Consular Affairs

Plaintiffs allege that Robert McCannell is the Executive Director of the Office of Legal Adviser for Consular Affairs. (Compl. SI 24.) Plaintiffs allege that Knute E. Malmborg is an attorney adviser at the Office of Legal Adviser for Consular Affairs. (Compl. 1 25.) Plaintiffs sue McCannell and Malmborg in their individual and official capacities. Plaintiffs also name the Office of Legal Adviser for Consular Affairs, of the U.S. Department of State, as a

defendant. (Compl. SI 21.) The only specific factual allegations made with regard to these defendants are that McCannell and Malmborg responded to Rodriguez's alleged FOIA request "only in response to express concerns" of the Fairfax Family Court, released to Rodriguez Hazbun's Hague Convention application only in Spanish, and "in violation of Rodriguez's right to petition the government,. . . refused to meet with Rodriguez." (Compl. SIS! 98-100, 102.) Rodriguez also asserts, apparently on the basis of the above alleged facts, that these defendants "conspired to conceal documents and provide falsely dated official documents." (Compl. SI 101.) Finally, plaintiffs claim that McCannell and Malmborg acted negligently by improperly authorizing the alleged conspiracy, allowing interference in Rodriguez's family court action, failing to train and properly supervise employees, and failing to assure access and communication between Rodriguez and Isidoro. (See Compl. SI 123.)

III. PRIVATE DEFENDANTS

With regard to the following private defendants, plaintiffs allege that each "ha[s] and continues to engage in a custom, policy, or practice [of disregarding] and thereby violating the fundamental rights of United States citizens vis-a-vis their application and administration of the [Hague] Convention." (Compl. SI 69; see Compl. SIS! 84, 96, 116.) Plaintiffs also claim generally that these defendants, or their employees and agents, "intentionally conspired to deprive Rodriguez and Isidoro to their rights to equal protection and due process in whole or in part because of their being Hispanic." (Compl. SIS! 70, 97, 117; see Compl. SI 85.)

A. National Center for Missing and Exploited Children, Guillermo Galarza, Nancy Hammer, Ernie Alien

The National Center for Missing and Exploited Children ("NCMEC") is a nonprofit corporation which plaintiff alleges acts as an instrumentality or agency of the United States. (Compl. SI 10.) Defendants Guillermo Galarza and Nancy Hammer are employees of the NCMEC. (Compl. 1 12, 13.) Plaintiffs allege that "[u]pon information and belief during the months of August and September 2001. . . Galarza, and other unnamed and unknown employees of Defendant NCMEC began conspiring to act as fiduciary and/or attorneys for Hazbun." (Compl. SI 64.) Specifically, plaintiffs appear to claim that Galarza, on or about August 6, 2001, left a telephone message with Hazbun and Isidoro regarding Hazbun seeking the return of Isidoro to Colombia. (Compl. *1* 61.) Additionally, Galarza and other unknown employees of NCMEC sent e-mails and telefaxes "advising and exerting influence on the Colombian Central Authority to quickly submit the Convention application" in an attempt to stop the suit in the Fairfax Family Court "and to restrict consideration under the more limited review of the Convention in the Federal Court. . .." (Compl. 1 65.)

Plaintiffs also appear to allege that the NCMEC took some unspecified action that resulted in Hazbun's application "falsely alleg[ing] that Rodriguez had retained Isidoro against his will, and failed to advise of the dangers of the 'zone of war' throughout Colombia" and that the NCMEC, Malmborg and McConnell falsified a document, apparently a supplement to Hazbun's Convention application. (See Compl. 66, 68.) Plaintiffs also claim that these defendants rejected Rodriguez's request to meet with them. (Compl. SI 67.) Finally, plaintiffs contend that NCMEC employees and unnamed individuals "talked with and sat behind Hazbun[] expressing obvious support to the Court of her action. . .." (Compl. SI 107.)

Plaintiffs name Ernie Alien, President and Chief Executive Officer of the NCMEC, as a defendant, but do not

allege any specific facts with regard to him. (See Compl. SI 11.) Plaintiffs only state that Alien, along with Hammer and Galarza, acted negligently by improperly authorizing the alleged conspiracy, allowing interference in Rodriguez's family court action, failing to train and properly supervise employees, and failing to assure access and communication between Rodriguez and Isidoro. (See Compl. SI 123.)

B. Patrick H. Stiehm

Defendant Patrick Stiehm is an attorney who provides volunteer legal services for the NCMEC. (Compl. SI 19.) Plaintiff specifically alleges that Stiehm made statements in open court at a Fairfax Family Court status hearing that he was there on behalf of NCMEC and would be filing a complaint in federal court to enforce the Hague Convention. (Compl. SI 80.) Plaintiffs also claim that Stiehm filed the federal district court action to enforce the Convention "as part of a conspiracy with NCMEC to develop a legal strategy based on sophistry and to use every ^gaming' and sharp attorney practice to block and assume away the arguments presented regarding Isidoro and Rodriguez's fundamental rights. . . as well as to prevent information being placed into the court record regarding the dangerous situation in Colombia for U.S. citizens." (Compl. SI 83.) Finally, plaintiffs claim that Stiehm "filed various motions with both the Fourth Circuit and the District Court, to seek the immediate arrest of Isidoro by law enforcement. . .." (Compl. SI 110.)

C. Proskauer Rose, LLP; Warren L. Dennis; Susan Brinkerhoff

These defendants are outside legal counsel for the NCMEC. (Compl. SI 86.) Plaintiffs generally assert that these defendants "intentionally conspired to develop a legal strategy. . . to block and prevent information" from being placed on the

court record regarding the dangerous situation in Colombia, and conspired with the NCMEC to avoid his family court suit. (Comp. 87, 92) . They appear to claim that specific acts that are evidence of the conspiracy are that Dennis and Proskauer Rose wrote a letter to Rodriguez making "false, defamatory, and libelous statements" regarding Rodriguez's attempts to meet with various other defendants; that Dennis wrote a letter to Rodriguez that did not address a notice Rodriguez sent to NCMEC regarding the alleged violations of his constitutional rights and his request for a meeting; that Dennis, Brinkerhoff, and Proskauer Rose referred to Rodriguez's family court action, in some unspecified forum or document, as "Bad was petitioning for custody of the minor child,' so to obfuscate consideration" of plaintiffs' fundamental rights; and that they in some manner "assisted Defendant Stiehm in the conspiracy to file" the action in federal district court. (Compl. *11 88,* 90, 93, 94.)

D. Miles & Stockbridge, Stephen John Cullen

Plaintiffs allege that defendant Miles & Stockbridge, LLP is a law partnership, that defendant Stephen Cullen is an attorney with Miles & Stockbridge, and that each provides volunteer legal services for the NCMEC. (Compl. 1! 17-18.) Plaintiffs claim that "throughout the Federal Convention Action, in furtherance of the conspiracy to apply the legal sophistry that the Convention effectively amend the fundamental rights of Rodriguez and Isidoro under the Constitution, Defendants. . . intentionally conspired with Defendant NCMEC." (Compl. SI 106.) Specifically, plaintiffs allege that these defendants entered a *pro hac vice* appearance on behalf of Hazbun on April 10, 2002, that Cullen made a statement in open court regarding plaintiffs' fundamental rights, that Cullen received a volunteer of the year award from the NCMEC, and that these defendants filed various motions with the Fourth

Circuit and the district court. (Compl. 11 105, 108, 109, 110.)

DISCUSSION

Before a court may address the merits of a complaint, it must assure that it has jurisdiction to entertain the claims. See Scott v. England, 264 F. Supp. 2d 5, 8 (D.D.C. 2002) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)). Under Federal Rule of Civil Procedure 12 (b) (1), a defendant may move to dismiss a claim based on the court's lack of jurisdiction over the subject matter, and the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. See Forrester v. United States Parole Comm'n, 310 F. Supp. 2d 162, 167 (D.D.C. 2004); see also McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (noting that the plaintiff "must carry throughout the litigation the burden of showing that he is properly in the court"). Because subject matter jurisdiction focuses on the court's authority to hear the claim, a court must "conduct a careful inquiry and make a conclusive determination whether it has subject matter jurisdiction or not," 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 2d § 1350 (1990), by examining the complaint and, "where necessary, . . . [by] consider[ing] the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (internal quotation omitted). If a defendant facially challenges the basis for subject matter jurisdiction, the plaintiffs' factual allegations are assumed to be true, though a defendant's challenge to the jurisdictional facts requires a resolution of those disputed facts. See Wright & Miller, supra, § 1350; see also Artis v. Greenspan, 223 F. Supp. 2d 149, 154 (D.D.C. 2002). If the jurisdictional ground pled in the complaint is "insufficient or entirely lacking but there are facts

pleaded in the complaint from which jurisdiction may be inferred, then the [Rule 12 (b) (1)] motion must be denied.'" Minebea Co., Ltd, v. Papst, 13 F. Supp. 2d 35, 38 n.2 (D.D.C. 1998) (quoting Wright & Miller, supra § 1350) .

A motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) should be granted only where it appears that there is no set of facts in support of the claims which would entitle a plaintiff to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "To that end, the complaint is construed liberally in the plaintiff's favor, and . . . plaintiff[] [receives] the benefit of all inferences that can be derived from the facts alleged." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) . "However, the court need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Id. Thus, if plaintiff fails to allege sufficient facts to support a claim, that claim must be dismissed.

I. CONSTITUTIONAL CLAIMS

In Counts One and Two, Rodriguez charges that each of the defendants conspired to deprive him and his son of their rights to due process, equal protection, and access to the courts, and their right to petition the government under the First, Fifth, and Ninth Amendments. The gravamen of the complaint is that the defendants took actions in furtherance of an alleged conspiracy which allegedly resulted in the frustration of his custody suit in Juvenile and Domestic Court in Virginia. Specifically, plaintiffs claim that "due to Defendants bad motive' and conspiracy," plaintiffs have been deprived of "the fundamental rights of both Rodriguez as Father, and Isidoro as a Son in their

respective society and companionship, and their rights as U.S. citizens to be safe and remain in the United States without government interference pursuant to the Constitution. . .." (Compl. SI 128.) Rodriguez asserts that he has stated a Bivens claim. (Compl. SI 2.) Under Bivens, the federal courts may recognize a cause of action for damages against an individual personally for unconstitutional conduct committed by the individual as a federal official acting under color of law. Bivens, 403 U.S. at 392-97. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001); Browning v. Clinton, 292 F.3d 235, 250 (D.C. Cir. 2002) .

The federal defendants have moved to dismiss these claims arguing, *inter alia,* that plaintiffs' claims against the individual federal defendants in their personal capacities must be dismissed for lack of service of process, and that claims against the federal organizations and individual defendants in their official capacities must be dismissed because there has been no waiver of sovereign immunity for such claims. (Mem. Supp. Fed. Def.'s Mot. to Dismiss at 14, 25.) The private defendants have moved to dismiss these claims, arguing, *inter alia,* that the complaint fails to state a claim because it asserts only conclusory allegations, unsupported by alleged facts, of a conspiracy to deprive plaintiffs of their constitutional rights, that none of the private defendants are proper Bivens defendants, and even if the individual defendants were proper Bivens defendants, they would be entitled to qualified immunity from such claims. (Private Def.'s Mot. at 16-18.)

A. Service of Process on Defendants Marshall, McCannell, and Malmborg

In a Bivens action against a federal official in his or her individual capacity, the defendant must be served

pursuant to rules that apply to individual defendants. See Simpkins v. District of Columbia Gov't, 108 F.3d 366, 369 (D.C. Cir. 1997); Delgado v. Fed. Bureau of Prisons, 727 F. Supp. 24, 26 (D.D.C. 1989); Lawrence v. Acree, 79 F.R.D. 669, 670 (D.D.C. 1978). It is a plaintiff s responsibility to establish personal jurisdiction, and the plaintiff must ensure that service is properly effectuated by remedying any known defect in service. See Reuber v. United States, 750 F.2d 1039, 1049, 1052 (D.C. Cir. 1984), abrogated on other grounds by Kauffman v. Anglo-American School of Sophia, 28 F.3d 1223 (D.C. Cir. 1994); Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987).

Defendants contend in their motion to dismiss that plaintiffs failed to personally serve process on Marshall, McCannell, and Malmborg. (Mem. Supp. Fed. Def.'s Mot. to Dismiss at 14.) Plaintiffs moved for a declaratory judgment as to service of process on these defendants, alleging that service was accomplished by delivery of a summons and complaint to an employee from the Department of State's Office of Legal Advisor. (See Docket Entry #26.) In ruling on plaintiff's motion, the court noted that plaintiff's belief during the first month of litigation that personal service on these three defendants was effective in their personal capacities was not wholly unwarranted, and that plaintiff had moved promptly to resolve the status of this service issue after the effectiveness of the service was challenged. The court's Order gave plaintiff 85 days from March 10, 2004 to serve process upon Marshall, McCannell, and Malmborg in their individual capacities. (See Docket Entry #116.) To date, plaintiff has not provided notice that these defendants have been served in their individual capacities. As such, the plaintiffs' Bivens claims against Marshall, McCannell, and Malmborg in their individual capacities will be dismissed.

B. Sovereign Immunity for Bivens Claims Against Federal

Organizations and Individuals in their Official Capacities

Plaintiffs, in Counts One and Two, also appear to be seeking recovery against the United States, the United States Department of State and its offices -- The Office of Children's Issues and The Office of Legal Adviser for Consular Affairs -- as well as the individual federal defendants -Marshall, McCannell, and Malmborg-in their official capacities.

Sovereign immunity bars all suits against the United States, including suits against federal officers in their official capacities, except when there has been a statutory waiver of such immunity. See United States v. Mitchell, 445 U.S. 535, 538 (1980) (explaining that the United States, as sovereign, is immune from suit except where it consents to be sued, and that a waiver of sovereign immunity cannot be implied but must be expressed with clear congressional intent); Kentucky v. Graham, 473 U.S. 159, 166 (1985) (an official-capacity suit is to be treated as a suit against the government entity itself). The United States has not waived its sovereign immunity with respect to constitutional tort claims. Clark v. Library of Congress, 750 F.2d 89, 103 n.31, 104 (D.C. Cir. 1984) (in suit against Library and Librarian of Congress for violation of First Amendment rights, court held that sovereign immunity barred suit for money damages against Library and Librarian acting in his official capacity); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982)(holding that, as to constitutional tort claim, the United States and its agencies were not proper defendants because of sovereign immunity, and explaining that Bivens does not waive sovereign immunity for actions against the United States). Furthermore, even where sovereign immunity has been waived, Bivens has not been extended to permit suit against a federal agency. See FDIC v. Meyer, 510 U.S. 471, 484-86 (1994). "[T]he purpose of Bivens is to deter *the*

officer,' not the agency." Corr. Servs. Corp., 534 U.S. at 69 (quoting FDIC v. Meyer, 510 U.S. at 485) .

Accordingly, any Bivens claims asserted against the United States, federal agencies, and individual defendants in their official capacities are barred by the doctrine of sovereign immunity and will be dismissed pursuant to Federal Rule of Civil Procedure 12 (b) (1).

C. Private Entities Engaged in Alleged Constitutional Deprivation

The Supreme Court has held that there is no private right of action, pursuant to Bivens, for damages against private entities acting under color of federal law. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (in action alleging constitutional deprivation against private operator of halfway house, Supreme Court rejected the request to extend Bivens liability to new category of defendants); see also Kauffman v. Anglo-American School of Sofia, 28 F.3d 1223, 1224 (D.C. Cir. 1994)(holding that an entity that is not a federal agency, but that is constrained by the Constitution in some or all of its acts solely because of lesser links to the federal government, is equally exempt from Bivens liability); Meuse v. Pane, 322 F. Supp. 2d 36, 38-39 (D. Mass. 2004) (holding that plaintiff could not sustain a Bivens action against broadcast network because "a Bivens claim is simply not available against a private entity even if that entity is acting under the color of federal law").

Plaintiffs assert that NCMEC "is a nonprofit corporation operating in all the States acting as an instrumentality or agency of the United States." (Compl. 1 10.) Plaintiffs thus seem to be asserting inconsistently that the NCMEC is both a nonprofit corporation, which NCMEC claims to be, and a

government agency. Assuming that NCMEC is a nonprofit corporation, whether or not NCMEC was acting under the color of federal law, plaintiffs have no right of action for damages against it, and thus the constitutional claims for damages against NCMEC must be dismissed. Alternatively, construing the complaint to allege that the NCMEC is a government agency and accepting such a claim as true, the NCMEC has sovereign immunity from such claims as is explained above.

Plaintiffs also assert that defendants Proskauer Rose, LLP and Miles & Stockbridge, LLP are law partnerships, each of which provides legal counsel or legal service to NCMEC. (Compl. 11 14, 17.) As to these private entities as well, whether or not they were acting under the color of federal law, plaintiffs have no private right of action for damages for alleged constitutional violations.

D. Alleged Constitutional Violations by Alien, Hammer, Galarza, Stiehm, Dennis, Brinkerhoff, and Cullen

Several defendants argue that the Bivens claims against them should be dismissed because they are private actors not acting under the color of federal law, and thus are not proper Bivens defendants. (Private Def.'s Mot. to Dismiss at 32.) "Critical to a successful Bivens claim" is that defendants "must have acted `under color of [federal] authority.'" Browning v. Clinton, 292 F.3d 235, 250 (D.C. Cir. 2002)(quoting Bivens, 403 U.S. at 389). "To be `under color of authority,' the conduct must be' cloaked with official power [and the official must] purport to be acting under color of official right.'" Id. (quoting Lopez v. Vanderwater, 620 F.2d 1229, 1236 (7th Cir.1980)).

Proskauer Rose attorneys Warren Dennis and Susan Brinkerhoff, Miles & Stockbridge attorney Stephen Cullen, and

solo practitioner Patrick Stiehm, are private attorneys. Plaintiffs' complaint does not allege that any of these individuals or their firms are employees or officers of the United States, that they are government actors, or that they acted under the color of federal law. As such, they are not proper Bivens defendants. See Van Leeuwen v. United States, 868 F.2d 300, 301-02 (8th Cir. 1989)(affirming district court's ruling that plaintiffs did not state Bivens claim or § 1983 claim against certain defendants, because none was a government actor or in conspiracy with a government actor). Cf. Polk County v. Dodson, 454 U.S. 312, 318 (1981)(noting that "the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor `under color of state law' within the meaning of § 1983"); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980) ("In their capacities as representatives of a client in court, private counsel do not act under color of state law.").[1]

Defendants Alien, Hammer, and Galarza are employees of the NCMEC, a nonprofit corporation. (See Compl. *11* 10-13.) The defendants argue that "[a]lthough the NCMEC carries out certain Hague Convention and ICARA functions on behalf of the State Department, the NCMEC is simply a private non-profit corporation that has contracted with the Depart

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[1]Although plaintiffs appear to allege that these private attorneys conspired with government actors, plaintiffs' conclusory allegations of a conspiracy, unsupported by the alleged facts, are insufficient to recognize a cause of action against these private individuals under Bivens. See Ostrer v.Aronwald, 567 F.2d 551, 553 (2d Cir. 1977); Meyer v. Reno, 911 F. Supp. 11, 15 (D.D.C. 1996)(dismissing plaintiff's claims for failure to state a claim upon which relief can be granted, as plaintiff failed to assert any factual basis to support the conclusion that a conspiracy existed)(citing Martin v. Malhoyt, 830 F.2d 237, 258 (D.C. Cir. 1987)).

ment of Justice and the State Department via a Cooperative Agreement to perform those functions." (Private Def.'s Mot. to Dismiss at 33).

Whether Alien, Hammer, and Galarza acted under color of federal authority need not be resolved, however, because even if they did, the claims of constitutional violations against these defendants do not withstand the defense of qualified immunity. Under Bivens, the federal courts may recognize a cause of action for damages for unconstitutional conduct committed by a federal official acting under color of law. 403 U.S. at 392-97. Government officials performing discretionary functions, however, generally have "qualified immunity" from civil damages liability unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[2] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity "focuses on the objective legal reasonableness" of the action as measured by legal rules that were "clearly established" at the

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[2]Supreme Court decisions have recognized two kinds of immunity defenses. "For officials whose special functions or constitutional status requires complete protection from suit, [the Supreme Court has] recognized the defense of `absolute immunity.'" Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). For example, absolute immunity applies to legislators in their legislative functions, judges in their judicial functions, and certain officials of the Executive Branch. Id. "For executive officials in general, however, . . . qualified immunity represents the norm. . .. [H]igh officials require greater protection than those with less complex discretionary responsibilities." Id. Furthermore, the Supreme Court has recognized that while judicial and legislative functions, for example, require absolute immunity, this protection extends only to acts legislative or judicial in nature, and not to other acts of judges and legislators, even when taken in their official capacities. Id. at 811.

time the action was taken. Id. at 819.

Whether an official has qualified immunity is resolved by a two-step inquiry. See Saucier v. Katz, 533 U.S. 194, 201 (2001); Maye v. Reno, 231 F. Supp. 2d 332, 336 (D.D.C. 2002). The threshold question is whether, "[t]aken in the light most favorable to the party asserting the injury,. . . the facts alleged show the officer's conduct violated a constitutional right[.]" Saucier, 533 U.S. at 201 (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id. If a violation could be made out, the second inquiry is "whether the [constitutional] right was clearly established." Id.

In assuming the truth of the facts plaintiffs have alleged, construing the complaint liberally in the plaintiffs' favor, and giving the plaintiffs the benefit of all inferences that can be derived from the facts alleged, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint [or] accept legal conclusions cast in the form of factual allegations." Kowal, 16 F.3d at 1276. Furthermore, "complaints containing only `conclusory,' `vague,' or `general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977)(holding that plaintiffs' unsupported allegations did not suffice to state a claim of governmental conspiracy to deprive plaintiffs of their constitutional rights, explaining that the complaint failed to show a nexus between an alleged pattern of harassment and acts of defendants). "Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Id. Cf. Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 106-08 (2d Cir. 1981) (where plaintiff sued Postal Service and its officials for

interference with constitutional rights, court affirmed grant of summary judgment, without discovery, to defendants where plaintiff merely "colored its complaint with conclusory allegations of a wide-ranging conspiracy to deprive it of its constitutional right to due process and free exercise of religion" and when required to furnish affidavits demonstrating existence of genuine issue of material fact, "plaintiff responded by presenting immaterial factual inconsistencies and by reiterating its conclusory allegations of conspiracy").

Here, plaintiffs' complaint contains merely conclusory allegations that employees of the NCMEC were engaged in a conspiracy to deprive plaintiffs of their fundamental rights. For example, plaintiffs allege that these defendants "have and continue[] to engage in a custom, policy, or practice of a conspiracy to disregard and thereby violat[e] the fundamental rights of United States citizens," and that "in furtherance of its unlawful custom, policy or practice. . . Defendants employees and agents intentionally conspired to deprive [plaintiffs] to their rights. . .." (See Compl. 11 69, 70.) Plaintiffs make many other broad-brush allegations, including that defendants "surreptitiously through legal sophistry use[d] the Convention to supercede the fundamental rights" of plaintiffs, that "[i]t is presumptively unconstitutional and violative of due process and access to the courts by a broad conspiracy to use political clout with the federal courts and to systematically take official action design[ed] to frustrate Isidoro suit in the Fairfax Family Court. . .." (See Compl. SI 129) . However, plaintiffs allege no specific facts which would be evidence of the existence of any such alleged conspiracy, or upon which an inference that such a conspiracy existed could be drawn.

To the extent that plaintiffs do make specific fact allegations regarding Galarza, Hammer, and Alien, they merely claim that Galarza left a telephone message with

Hazbun regarding Isidoro, that Galarza sent e-mails and faxes to the Colombian Central Authority allegedly advising it to quickly submit Hazbun's Convention application, and that Hammer refused to meet with Rodriguez. They also claim that these defendants allowed interference in Rodriguez's family court action, failed to train and properly supervise employees regarding plaintiffs' rights, and failed to assure access and communication between Rodriguez and Isidoro. These alleged facts do not allege either a conspiracy to deprive plaintiffs of their rights or the deprivation of any constitutional right at all. Nor do the results of these alleged actions support an inference that they were undertaken as part of an actionable conspiracy. Plaintiffs were not deprived of due process, access to the courts, a right to petition the government, or a father/son relationship. Rodriguez was heard by both the U.S. District Court for the Eastern District of Virginia and the U.S. Court of Appeals for the Fourth Circuit. See Hazbun Escaf v. Rodriguez, 200 F. Supp. 603 (E.D. Va. 2002); Escaf v. Rodriguez, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. 2002)(unpublished), cert. denied, 538 U.S. 1000 (2003). Judqe Ellis and the Fourth Circuit fully considered plaintiffs' custody claims and decided them. The Fourth Circuit also decided that the district court proceedinqs did not violate Rodriguez's parental rights or Isidoro's due process rights. Escaf v. Rodriguez, 52 Fed. Appx. 207 at 209. To the extent that plaintiffs are seeking relitigation of those issues, their claims are barred by the doctrine of collateral estoppel. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-33 (1979)(holdinq that petitioners were collaterally estopped from relitiqatinq question of whether proxy statement was false and misleadinq, because petitioners had "full and fair" opportunity to litiqate their claims in a prior action brouqht by the SEC); Otherson v. Dep't of Justice, 711 F.2d 267, 273 (D.C. Cir. 1983) (collateral estoppel, or issue preclusion, is established when an issue was actually litigated and submitted for judicial determination in

an earlier case, the issue was "actually and necessarily determined by a court of competent jurisdiction" in the first case, and preclusion in the second case does not cause any unfairness).

II. CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Plaintiffs allege in Count Three that the acts of defendants Marshall, McCannell, Malmborq, Alien, Hammer, Galarza and other unknown individuals violated the Federal Tort Claims Act ("FTCA"), in that their actions violated plaintiffs' rights to the society and companionship of the father-son relationship and access to the courts, and constituted an "illegal shanghaiing of Isidoro from the United States," negligent supervision, intentional infliction of emotional distress, violation of freedom to petition the government, falsification of official documents, and invasion of privacy. (Compl. *n* 139-142.) The federal defendants contend that the FTCA claims against them should be dismissed for failure to exhaust administrative remedies and for failure to state a valid claim under the FTCA. (Mem. in Support of Fed. Def.'s Mot. to Dismiss at 27-29.) The private defendants contend that only the United States is a proper defendant to an FTCA claim, and that the claim is foreclosed in any event by failure to file an administrative complaint against these defendants. (Private Def.'s Mot. to Dismiss at 35-37.)

The federal government, its agencies, and federal officials when sued in their official capacities, are shielded from tort actions for damages unless sovereign immunity has been waived. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Mitchell, 445 U.S. 535, 538 (1980). The FTCA provides for a limited waiver of sovereign immunity for common law torts when the government's employees act negligently within the scope of their employment.

However, the FTCA does not waive sovereign immunity with respect to constitutional torts. See FDIC v. Meyer, 510 U.S. 471, 477-78 (1994) ("the United States simply has not rendered itself liable under [28 U.S.C.] § 1346 (b) for constitutional tort claims"); Laswell v. Brown, 683 F.2d 261, 267-68 (8th Cir. 1982); Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978); Zakiya v. United States, 267 F. Supp. 2d 47, 56 (D.D.C. 2003); Meyer v. Fed. Bureau of Prisons, 929 F. Supp. 10, 13-14 (D.D.C. 1996); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1317 (D.D.C. 1985). Thus, plaintiffs' constitutional claims for access to the courts, to petition the government, violation of their rights to society and companionship of the father-son relationship,[3] and any other of these charges which could be construed as constitutional torts, must be dismissed as there is no applicable waiver of sovereign immunity.

A prerequisite to filing a civil tort action under the FTCA is the requirement of presentment pursuant to 28 U.S.C. § 2675 (a) . A claimant must present his claim to the appropriate administrative agency, and the claim must be denied by the agency, before the claimant may institute an action for that claim under the FTCA. 28 U.S.C. § 2675 (a) ; see GAF Corp. v. United States, 818 F.2d 901, 917-18 (D.C. Cir. 1987). Section 2675 (a) requires a claimant to file with the agency: "(1) a written statement sufficiently describing the injury to

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[3]Plaintiffs claim a right to society and companionship in the father-son relationship under the Fifth Amendment. Plaintiffs' articulation of this right is vague at best. The private defendants' motion speculates that plaintiffs allege a fundamental Due Process Clause right of parents in the care and custody of their children. However, whether this right of companionship that plaintiffs claim is an established constitutional right need not be decided.

enable the agency to begin its own investigation, and (2) a sum-certain damages claim." GAF Corp., 818 F.2d at 919. This notice requirement enables the agency "to investigate and ascertain the strength of a claim" and "to determine whether settlement or negotiations to that end are desirable." Id. at 920.

Rodriguez filed an administrative claim for relief with the United States Department of State on January 7, 2002. (Corapl. SI 142; see Compl. Ex. 13, 22.) The complaint was denied on August 1, 2002.[4] (Complaint SI 142; Ex. 21.) (See Compl. Ex. 23.) Plaintiff's administrative claim, in the form of a letter to Marshall, complains of actions violating his and his son's "fundamental Constitutional rights" and specifically alleges the following injuries: 1) that a letter from Marshall to Judge Valentine (of the Virginia Juvenile Domestic Court) misstated facts regarding Rodriguez's family court action and was "designed to obfuscate" Rodriguez's and Isidoro's fundamental rights "to modify the custody agreement"; 2) that Patrick Stiehm entered an appearance on behalf of the NCMEC in Rodriguez's family court action and stated that he would be filing a complaint in U.S. District Court under the Hague Convention and would be seeking a dismissal of the family court action, also allegedly "designed [to] obfuscate" Isidoro's fundamental rights; and 3) that Rodriguez "could only obtain telephone contact" with the NCMEC staff and Ms. Espie of Marshall's staff. (Compl. Ex. 13.) Plaintiff s letter also states

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[4]After this denial, on September 15, 2002, plaintiff filed an amendment to his administrative complaint (see Compl. SI 142, Ex. 22), which was not considered by the Department of State as it was deemed untimely. (See Compl. Ex. 23.) Under the regulations to the FTCA, 28 C.F.R. § 14.2 ©), an administrative claim "may be amended by the claimant at any time prior to final agency action. . .."

that these acts "have caused emotional distress and apprehension of the possible forced return and detention of [Isidoro] in Colombia." (Compl. Ex. 13.) This administrative complaint fails to present to the administrative agency all of the putative tort claims plaintiffs currently raise before the Court in Count Three of their complaint. Rodriguez's administrative complaint does not, and cannot reasonably be construed to, raise claims of "illegal shanghaiing of Isidoro from the United States," negligent supervision, falsification of official documents, or invasion of privacy. Thus, these claims must be dismissed as plaintiffs have failed to comply with the requirement of 28 U.S.C. § 2675. See Kline, 603 F. Supp. at 1317 (because plaintiffs failed to comply with 28 U.S.C. § 2675(a), their suit was barred).

The only of plaintiffs' common law tort claims in Count Three arguably raised at the agency level is intentional infliction of emotional distress. Intentional infliction of emotional distress "requires conduct so "'outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"" Browning v. Clinton, 292 F.3d 235, 248 (D.C. Cir. 2002)(quoting Bernstein v. Fernandez, 649 A.2d 1064, 1075 (D.C. 1991) (quoting Restatement (Second) of Torts § 46 cmt. d (1965))). However, none of the factual allegations in the complaint that arguably were presented to the agency -- which include misstating facts, entering an appearance in court, and declining to meet with Rodriguez -- is so outrageous in character or so extreme in degree as to go beyond all possible bounds of decency. Thus, appellant can prove no set of facts in support of the intentional infliction of emotional distress claim. See Browning, 292 F.3d at 241, 248 (holding that where plaintiff made intentional infliction of emotional distress claim, relying upon threats and statements made which included terms such

as "scurrilous" and "garbage," situation could have been disturbing to plaintiff but did not go beyond all possible bounds of decency or qualify as "utterly intolerable in a civilized community"); Roqala v. District of Columbia, 161 F.3d 44, 57-58 (D.C. Cir. 1998) (where plaintiff alleged emotional distress based on police officer's actions of threatening to arrest her, yelling at her, laughing at her, and detaining her for an unnecessarily length of time at a police station, the court found that the officer's "conduct did not approach the level of egregiousness necessary to sustain a claim for intentional infliction of emotional distress").[5]

III. CLAIM OF CONSPIRACY TO VIOLATE CIVIL RIGHTS UNDER 42 U.S.C. § 1985(3) AND ACTION FOR NEGLECT TO PREVENT UNDER § 1986

In Count Four, plaintiffs allege that "some or all of the [defendants and others" conspired to violate their constitutional rights based on a discriminatory animus towards United States Hispanic men, in violation of 42 U.S.C. §§ 1985(3) and 1986. Specifically, plaintiffs claim that "there was a Meeting of the Minds among [the defendants] regarding their desire to

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[5]Plaintiffs appear to concede that they are not raising any common law tort claims in Count Three. In their opposition to the defendants' motions to dismiss, plaintiffs state that the defendants "are confused -- the FTCA claim was [] based on . . . the negligent actions to violate the rights under the Treaty and ICARA of the right of Isidoro to have the Fairfax Family Court hear the Treaty claim" and that the defendants' actions were "designed to deprive Rodriguez and Isidoro of their fundamental rights -- so to prevent a determination that the Treaty was unconstitutional as to efforts to take Isidoro out of the United States." (Pl.'s Omnibus Resp. in Opp. to Def.'s Motions to Dismiss at 29-30.)

violate and deprive Rodriguez and Isidoro based on being Hispanic United States citizens of the equal privileges and immunities under fundamental constitutional civil rights in the society and companionship in the father/son relationship, access to the Courts, and for Isidoro to stay in the United States." (Compl. SI 144.) Plaintiffs incorporate by reference all other facts alleged in their complaint in support of their conspiracy claim. (See Compl. SI 143.)

Section 1985(3) prohibits conspiracies to deprive any person of the equal protection of the law. 42 U.S.C. § 1985(3). Plaintiffs' §§ 1985 (3) claim against the federal defendants must be dismissed because it is barred by the doctrine of sovereign immunity. See Hohri v. United States, 782 F.2d 227, 245 n. 43 (D.C. Cir. 1986) (holding that § 1985, by its terms, does not apply to actions against the United States), vacated on other grounds, 482 U.S. 64 (1987); Brug v. Nat'l Coalition for the Homeless, 45 F. Supp. 2d 33, 40 (D.D.C. 1999); Graves v. United States, 961 F. Supp. 314, 318 (D.D.C. 1997).

The private defendants argue for dismissal on the ground that plaintiffs failed to allege facts that would demonstrate that the defendants acted out of racial animus. Plaintiffs "suing under § 1985(3) must allege: (1) a conspiracy; (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, or of privileges and immunities under the law; (3) motivated by some class-based, invidiously discriminatory animus; (4) whereby a person is either injured in his person or property, or is deprived of any right or privilege of a citizen of the United States." Bruq, 45 F. Supp. 2d at 40 (citing Graves, 961 F. Supp. at 320.) Moreover, "[t]o sufficiently state a cause of action the plaintiff must allege some facts that demonstrate that his race [or other class-based animus] was the reason for the defendant[s'] [actions]. [A]

failure to allege such facts render[s] [a] discrimination claim under. . . § 1985 incomplete." Jaffree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982)(where plaintiff s amended petition seeking writ of mandamus alleged that defendant had not investigated plaintiff's charges because of his race, and the only facts underlying that claim were that "the plaintiff is ^ Brown"' and "that his charges have not been investigated," court affirmed dismissal of the claim on the basis that allegations were conclusory); see Beran v. United States, 759 F. Supp. 886, 893 (D.D.C. 1991)(dismissing plaintiff's § 1985 claim in light of fact that plaintiff presented no facts to indicate that alleged conspiracy was prompted by racial or class-based animus); Maye v. Reno, 231 F. Supp. 2d 332, 339 (D.D.C. 2002)(holding that plaintiff failed to allege the requisite elements of a claim under any section of § 1985, for, among other reasons, plaintiff "provided insufficient allegations that he was treated differently from other similarly situated individuals"); Thomas v. News World Communications, 681 F. Supp. 55, 69 (D.D.C. 1988) (where plaintiffs claimed that alleged torts were motivated by religious animus, court held that plaintiffs failed to allege with sufficient specificity that defendants were motivated by discriminatory animus; where plaintiffs did expressly allege that defendants were motivated by religious animus, they also alleged other, non-actionable motivation, and "fail[ed] to specify any evidence that would support any of these allegations"). Here, plaintiffs claim that defendants conspired against them "in whole or in part because of their being Hispanic," and that they neglected to prevent violations of plaintiffs' fundamental rights "based on invidious discriminatory animus against Rodriguez and Isidoro as U.S. citizens Hispanic men," but plaintiffs allege no facts, which if taken as true, would support such a claim.

Section 1986 provides a right of action for damages against a person who, "having knowledge that any of the

wrongs conspired to be done, and mentioned in section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed. . .." 42 U.S.C. § 1986. "The language of this provision establishes unambiguously that a colorable claim under § 1985 is a prerequisite to stating an adequate claim for neglect to prevent under § 1986." Thomas, 681 F. Supp. at 72 (citing Mollnow v. Carlton, 716 F.2d 627, 632 (9th Cir. 1983)); see Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972). Here, since plaintiffs have failed to state a claim under § 1985, plaintiffs' claims under 42 U.S.C. § 1986 will be dismissed.

IV. WRIT OF MANDAMUS

Plaintiffs also request a writ of mandamus directing the U.S. Department of State to "keep [Isidoro] safe while in Colombia, assure access and unhindered communication with Isidoro, and to seek [Isidoro's]. . . immediate return to the United States." (Compl. at 38-39.)

A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. United States Dep't of Justice, 182 F.3d 981, 986 (D.C. Cir. 1999). For a writ of mandamus to issue, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." Kerr v. United States Dist. Court for Northern Dist. of California, 426 U.S. 394, 403 (1976). In addition, the party seeking the writ must satisfy "the burden of showing that [his] right to issuance of the writ is ^clear and indisputable.'" Id. (internal quotations omitted). Furthermore, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." Id.

Here, plaintiffs cannot establish that their right to issuance of the writ is "clear and indisputable." Indeed, the writ of mandamus that plaintiffs seek in this district would circumvent the order issued by the court in the Eastern District of Virginia requiring that Isidoro return to Colombia. Plaintiffs have neither presented any authority supporting the power of a district court to aid petitioners in achieving such judicial manipulation, nor established that the judicial process he invoked in Virginia was unavailable to adjudicate his case. The writ will be denied.

V. MOTION TO DISQUALIFY AND AMENDED COMPLAINT

Plaintiff Rodriguez filed a motion to disqualify me from this matter and to appoint a judge outside of the District of Columbia and the Fourth Circuit. Rodriguez claims that since plaintiffs have filed an amended complaint naming me as a defendant, I am required to disqualify myself pursuant to 28 U.S.C. § 455 (b) (5) (I) .

Section 455 (b) (5) (I) states that a judge "shall. . . disqualify himself" when he "[i]s a party to the proceeding. . .." 28 U.S.C. § 455 (b) (5) (I) . However, courts have construed this section as not requiring automatic disqualification. Anderson v. Roszkowski, 681 F. Supp. 1284, 1289 (N.D. 111. 1988) (citations omitted), aff'd, 894 F.2d 1338 (7th Cir. 1990). See, e.g., Tapia-Ortiz v. Winter, 185 F.3d 8, 10 (2d Cir. 1999)(holding that where appellant indiscriminately named all then-current Second Circuit judges as defendants, under the "rule of necessity" the court was not disqualified from resolving the appeal, despite § 455(b)(5)(I)). For example, "courts have refused to disqualify themselves under Section 455 (b) (5) (I) unless there is a legitimate basis for suing the judge" in order to prevent plaintiffs from "judge-shopping." Anderson, 681 F. Supp.

at 1289 (citing In re Martin-Trigona, 573 F. Supp. 1237, 1243 (D. Conn. 1983)). As one commentator has explained:

> A judge who is named as a defendant in a plaintiff's amended complaint is not required to disqualify himself or herself under 28 U.S.C.A. § 455 (b) (5) (I) unless there is a legitimate basis for suing the judge. For a judge to be disqualified simply because the plaintiff has sued the judge would be to allow the plaintiff to manipulate the identity of the decision-maker and thus to engage in judge-shopping.

32 Am. Jur. 2d Federal Courts § 149. In Anderson, the plaintiffs filed an amended complaint naming the current judge sitting in the case as a defendant, and renewed a previously filed motion to disqualify all of the judges in the Seventh Circuit and to transfer the case to a judge out of the Seventh Circuit. 681 F. Supp. at 1287-88. The court held that it was not required to disqualify itself under Section 455(b)(5)(I), explaining:

> It is apparent to the Court that plaintiffs do not have a legitimate basis for suing me, my secretary, and my minute clerk. None of us were sued in plaintiffs' initial complaint; we were added as defendants only after I dismissed plaintiffs' Complaint. . .. To disqualify myself simply because plaintiffs have sued me would be to allow plaintiffs to manipulate the identity of the decision maker and to engage in "judge-shopping". ... If this Court were to disqualify itself. . . plaintiffs would sue the new district judge and so on and so on. The Court will not allow plaintiffs to impede the administration of justice by suing every district judge. . . until their case is transferred out of the Seventh Circuit.
>
> Id. at 1289.

Plaintiffs here have filed an amended complaint naming me, the United States District Court for the District of Columbia, the United States Courts of Appeals for the District of Columbia and Fourth Circuits and some of their judges, the Supreme Court of the United States, the Chief Justice of the United States, as well as other judges, organizations, and individuals. Plaintiffs' amended complaint appears to mirror in substance the original complaint, with a few additional defendants and causes of action. As in Anderson, it is apparent that plaintiffs do not have a legitimate basis for suing me or these other newly-named defendants. Rather, plaintiffs' amended complaint and motion to disqualify are merely transparent attempts to judge-shop and forum-shop. This is all the more evident given plaintiffs' previous motion requesting my recusal in this case pursuant to 28 U.S.C. §§ 144 and 455 (a) (see Docket Entry #73), which was denied. (See Docket Entry #114.) Because the thrust of plaintiffs' amended complaint clearly appears to be an effort to forum-shop and judge-shop, it will be stricken it its entirety.

CONCLUSION

Plaintiffs cannot proceed with their claims of constitutional violations under Bivens as to any of the defendants. Plaintiffs failed to serve process on the federal individual defendants in their individual capacities, and these individuals are entitled to sovereign immunity from suits for money damages against them in their official capacities. Additionally, the federal organizations have sovereign immunity from suits for money damages. The court thus does not have subject matter jurisdiction over these claims. As to the private organizations and some of the private individuals, they are not proper Bivens defendants. As to the other individual private defendants, even if they are proper Bivens defendants, plaintiffs have not stated a claim against them that would withstand qualified immunity.

The court also lacks subject matter jurisdiction over the plaintiffs' claims of constitutional torts under the Federal Tort Claims Act, as the United States has not waived sovereign immunity with respect to constitutional torts. Additionally, plaintiffs failed to present certain of their alleged non-constitutional tort violations at the agency level, and, with regard to the alleged tort violation they did present at the agency level, they fail to state a claim upon which relief can be granted.

Plaintiffs have also failed to allege facts supporting the existence of a conspiracy based on racial or other class-based animus sufficient to state a claim under § 1985(3). As such, they have also failed to state a claim under § 1986. Furthermore, plaintiffs have failed to show that their right to a writ of mandamus is clear and indisputable.

Finally, plaintiffs' recent motion to disqualify and their amended complaint are nothing more than a transparent attempt at judge-shopping and forum-shopping.

Accordingly, plaintiffs' motion to disqualify will be denied, the amended complaint will be stricken in its entirety, and plaintiffs' original complaint will be dismissed pursuant to Rules 12 (b) (1) and 12 (b) (6). An Order accompanies this Memorandum Opinion.

SIGNED this 31st day of March, 2005.

/s/_____
RICHARD W. ROBERTS
United States District Judge

Fairfax County Juvenile and
Domestic Relations District Court

To: Judge Mann Case No(s): JJ347050-01-03

From: Clerk's Office

Date: Jan. 21, 2005 Case Name: Rodriguez-Hazbun, Isidoro

Isidoro Rodriguez (Father) is appealing the following:
o Visitation

_____/s/_____
Isidoro Rodriguez

Bond Information

Juvenile Cases Only
Other: This is not an appealable order.
Date: Jan. 21, 2002 _____/s/_____
Judge Thomas Mann

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 18th day of August, 2004.

ISIDORO RODRIGUEZ-HAZBUN

Appellant.

v. Record No. 041702
Court of Appeals No3247-03-4

AMALIN HAZBUN ESCAF

Appellee.

From the Court of Appeals of Virginia

Upon consideration of the record and pleadings filed herein, the Court is of opinion that Isidoro Rodriguez lacks standing in this matter because he has no authority to sue in his son's name. Accordingly, the petition for appeal filed in this case is dismissed.

A Copy
Teste:
/s/
Clerk

United States Court of Appeals for the District of Columbia
Circuit
No-03-5092

Dated: July 1, 2003

In re Master Isidoro Rodriguez-Hazbun, fourteen-year-old son of Isidoro Rodriguez, Esq., and Isidoro Rodriguez, Esq. Father of Isidoro Rodriguez-Hazbun, a minor,

Petitioners

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, it is

ORDERED that the petition be denied.

Per Curiam

For the Court
Mark J. Lagger, Clerk
By s/_____
Michael c. McGrail
Deputy Clerk

A-55

United States Court of Appeals for the District of Columbia Circuit
No-03-5092

Dated: May 28, 2003

In re Master Isidoro Rodriguez-Hazbun, fourteen-year-old son of Isidoro Rodriguez, Esq., and Isidoro Rodriguez, Esq. Father of Isidoro Rodriguez-Hazbun, a minor,

Petitioners

BEFORE: Ginsburg, Chief Judge, and Edwards and Randolph, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, and the motion to expedite consideration of the petition, it is

ORDERED that the petition be denied. To the extent petitioner seeks a writ of mandamus to be issued by the district court, petitioner has not demonstrated a "clear and indisputable" right to relief and that "no other adequate means to attain the relief" exist. In re Sealed Case No. 98-3077, 151 F.3d 1059, 1062-63 & n. 4 (D.C. Cir. 1998)(citations omitted). In deed, to attain the relief he seeks from the district court to amend the docket to reflect pending civil action, petitioner may move the district court to amend the docket to reflect that such action was brought my petitioner both individually and on behalf of his minor son. To the extent petitioner seeks a writ of mandamus to be issued to the Department of State, it is well-settled that such request be brought before the district court in the first instance. See Telecommunication Research & Action Ctr. v. FCC,

750 F.2d 70, 77 (D.C. Cir. 1984). It is

FURTHER ORDERED that the motion to expedite be dismissed as moot.

Per Curiam
S/_____

Ref No. 23.833(CUSTODY AND VISIT REGULATION)
FIRST FAMILY COURT ROOM, BARRANQUILLA, COLOMBIA,
August 26, 1997

Mrs. Mabel Castro-Palacio-Defendant's Attorney in the process for custody and visit regulations initiated by Mrs. Amalin Hazbun, against Mr. Isidoro Rodriguez Cruz, in favor of minor Isidoro Rodriguez Hazbun, requests this Court to add the present document to the record of the hearing attended on August 1st, 1997, raised with basis on the conciliation that the parties arrived at, in order to determine clearly and expressly, that the custody of the above mentioned minor will be shared by the parents, since this was the basic point for the conciliation.

The Court, in order to resolve the petition of the Defendant's Attorney, refers to the statement of the Defendant, which was literally written down and is hereby transcribed in its relevant portion, so that this Court may take the corresponding decision. Mr. Rodriguez-Cruz states in the aforementioned document:

"[I propose Joint Custody of my son ISIDORO RODRIGUEZ HAZBUN in the following manner:] That his mother Mrs. Amalin Hazbun Escaf keep him under her personal care but that both parents share the right for the education, and the moral and intellectual up-bringing of our son. As for the visits, I propose to take my son Isidoro Rodriguez-Hazbun on Fridays every fortnight at school's exit hour, in order to spend the weekend together, and to take him back to his mother on Sunday at seven p.m. or on Monday if it is a holiday, with his home work done, and with his complete luggage. On weekdays, that is, form Monday to Friday, I commit myself to take my son ISIDORO to his additional lessons, then take him and stay with him until seven o'clock p.m., at weeks when he will spend the night over, this is to say, once a week. At weeks

when he will not spend the night, apart from taking him from the above mentioned additional lessons, I will take him to his soccer lessons once a week until seven p.m., meaning that week there will be two visiting days on working days."

From the foregoing transaction, it is clearly observed that the mother of the minor Isidoro, retains the child's custody, and therefore there is no need to make any clarification thereto.

It would be otherwise if Mrs. Amalin Emilia Hazbun-Escaf had not complied with the conciliation terms stated in the document alluded by Mrs. Mabel Castro, in which case strict compliance would be requested to the Court, and Mrs. Hazbun-Escaf penalized accordingly.

Notify and comply

s/_____

LUZ MYRIAM REYES CASAS, Judge

s/_____

Serra Newman, Certified Translator, Lic. Ministry of Justice, Bogota Colombia, March 25, 1988 (23/0701).

HEARING BEFORE FIRST FAMILY COURT OF BARRANQUILLA, COLOMBIA
PROCESS: CUSTODY AND PERSONAL CARES
PLAINTIFF: AMALIN HAZBUN ESCAF
DEFENDANT: ISIDORO RODRIGUEZ CRUZ
MINOR: 1

In Barranquilla, on August first (1st) of Nineteen Ninety Seven (1997), during public hearing at the First Family Court, the Honorable Judge declares open the hearing in this process of CUSTODY AND PERSONAL CARES of AMALIN HAZBUN ESCAF vs. ISIDORO RODRIGUEZ CRUZ, on behalf of minor ISIDORO RODRIGUEZ HAZBUN. It is confirmed that both parties are present and their attorneys. At this stage of the hearing the Honorable Judge advice the parties to present an agreement or conciliation formula.

Defendant Mr. ISIDORO RODRIGUEZ speaks and says:

I propose the Joint Custody of my son ISIDORO RODRIGUEZ HAZBUN in the following manner:

That the mother AMALIN EMILIA HAZBUN ESCAF have him her personal cares but both parents share the rights of correction, moral and intellectual education of our minor child.

Regarding visitations: I propose to pick up my son ISIDORO RODRIGUEZ HAZBUN every fifteen days at the end of school day on Friday for him to stay with me all that weekend, taking him back on Sunday at 7 pm to the house of his mother or on Monday if it is holiday, with his homework done and his complete luggage. During the week days, this is Monday through Friday, I will pick up my son ISIDORO to take him to classes with the additional teacher assigned, and will pick him up at the class and continue with him until 7 pm, this when in

that week it correspond to me his visitation spending the night with me, this is once a week. When there is no visitation spending night with me besides picking him up on the day of the above noted classes I will pick him up on the day he has football classes once a week until the same hour, that means that in that week there will be two visitation days on week days. I want to add that in the case that for any circumstances there is not football class or writing class with the teacher, he will be with me anyway two working days in the week and in the other week one working day and will spend the weekend with me.

Vacations will be shared as follows: The child will spend one year Carnivals with a parent and Holy Week with the other, mid year vacation since are longer jointly parents agree (.....) fifteen days with the mother. The end of year vacation this year the first fifteen days will be with the father permitting that if the minor is still with him for December 31st spend that date with his mother and go back with him to finish the vacation and this situation of the end of year vacation will alternate annually keeping always the spirit of sharing one of the two special dates of December 24 and 31st of each year. No discussion fathers' day he will spend it with his father and mothers' day with his mother. Regarding birthday of the child ISIDORO we will celebrate it jointly the parents with our son, making it clear that next celebration will be made by me.

Ms. AMALIN HAZBUN takes the word and states: I am totally in agreement with the formula offered by the defendant. The Honorable Judge takes the word to say. Since the parties have arrived to an agreement about the totality of the litigation, being such agreement in accordance with the law, it is approved and this process finished.

It is just confirmed that at the non-compliance with the agreed hereby it will be applied by express statement of num. 4

of art. 350 of the Minor Code the sanctions provided on article 72 ibidem.

No costs in this process. It is signed by all those who have intervened. The parties wish to clarify that just for year 1988 the mother will have the minor during Carnivals as well as Holy Week.

The Judge:
s/_____
LUZ MYRIAM REYES CASAS, Judge
Plaintiff:
s/_____
AMALIN HAZBUN ESCAF
Defendant:
s/_____
ISIDORO RODRIGUEZ CRUZ
Attorney for Plaintiff
s/_____
LUZ MYRIAM SANCHEZ DE CARVAJAL
Attorney for Defendant
s/_____
MABEL CASTRO PALACIO
The Court Clerk
s/_____
ELVIA MAZA DE CANTILLO
s/_____
Serra Newman, Certified Translator, Lic. Ministry of Justice, Bogota Colombia, March 25, 1988-23/07/01

U.S. CONSTITUTION, TREATY, FEDERAL STATUTES/ REGULATION AND CODE OF VIRGINIA, INVOLVED

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment of the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

Ninth Amendment of the United States Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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18 U.S.C. § 4 - Misprision of felony.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil . . . authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 1001 - Statements or entries generally.

(a) [W]hoever, in any matter within the jurisdiction of the executive, legislative, and judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, . . . a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; . . . shall be fined . . . or imprisoned not more than 5 years, or both.

18 U.S.C. § 1204 - International parental kidnapping.

(a) Whoever. . . retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section -

(1) the term "child" means a person who has not attained the age of 16 years; and

(2) the term "parental rights", with respect to a child, means the right to physical custody of the child -
(A) whether joint or sole (and includes visiting rights); and,
(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

---

28 U.S.C. § 3- Vacancy in office of Chief Justice; disability

Whenever the Chief Justice is unable to perform the duties of his office . . ., his powers and duties shall devolve upon

the associate justice next in precedence who is able to act, ...

28 U.S.C. § 291(a)-Circuit judges

(a) The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon the request by the chief judge or circuit justice of such circuit.

28 U.S.C. § 292(d)-District judges

(d) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

28 U.S.C. § 455-Disqualification of Justice, Judge . . . .

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .;

(5) He . . .

(I) Is a party to the proceeding, ... ;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Virginia Uniform Child Custody Jurisdiction and Enforcement Act

VA Code § 20-146.4. International application. —

A. A court of this Commonwealth shall treat a foreign country

as if it were a state of the United States for purposes of applying this article and Article 2 (§ 20-146.12 *et seq.*)

B. Except as otherwise provided in subsection C, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this act must be recognized and enforced under Article 3 (§ 20-146.22 *et seq.*) of this chapter.

C. A Court of this Commonwealth need not apply this act if the child custody law of a foreign country violates fundamental principles of human rights.

VA Code § 20-146.23. Enforcement under Hague Convention Under this article a court of this Commonwealth may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction.

VA Code § 20-146.25. Temporary visitation. —

A. A court of this Commonwealth that does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing: 1. A visitation schedule made by a court of another state . . . .;

VA Code § 20-146.29. Expedited enforcement of child custody; determination. —C. Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

VA Code § 20-146.35. Appeals. — An appeal may be taken

from a final order in a proceeding under this article in accordance with expedited appellate procedures in other civil cases. . . .

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501

Article 1

The object of the present Convention are-. . . . b) to ensure that rights . . . of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting State shall take all appropriate measures to secure within their territories the implementation of the object of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 5

For the purpose of this Convention-. . . . b)"right of access" shall include the right to take a child for a limited period of time to a place other then the child's habitual residence.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously for the return of children. . . .

Article 19

A decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Chapter IV–Right of Access, *Article 21*

An application to make arrangement for organizing or,

securing the effective exercise of the rights of access may be presented to the Central Authority of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights are subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Article 29

This Convention shall not preclude any person, . . . who claims there has been a breach of . . . access within the meaning of . . . Article 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

The International Child Abduction Remedies Act

42 U.S.C. § 11601

(a) Findings. The Congress makes the following findings: . . . .

(4) The Convention on the Civil Aspects of International Child Abduction, . . . establishes legal rights and procedures for the prompt . . . securing the exercise of visitation rights. . . .

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention. . . .

(4) The Convention and this chapter empower courts of the United States to determine under the Convention and not the merits of any underlying child custody claims.

42 U.S.C. § 11602. Definitions

For the purpose of this chapter-

(1) the term "applicant" means any person who, . . . , files an application . . . for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention.

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking the relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights.

42 U.S.C. § 11603

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction or actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention . . . for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. . . .

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention .

(e) Burden of proof

(1) a petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence- . . . .

((B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

42 U.S.C. § 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

Department of State, 51 Fed. Reg. 10,513 (1986), V. Access Rights-Article 21.

C. Procedure for Obtaining Relief

Procedurally Article 21 authorizes a person complaining of, or seeking to prevent a breach of access rights to apply to the CA of a Contracting State in the same way as a person seeking return of the child. . . .

Once the CA receives such application, it is to take all appropriate measures pursuant to Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights are subject. . . .

D. Alternative Remedies

In addition to or in lieu of invoking Article 21 to resolve visitation-related problems, under Article 18, 29 and 34 an aggrieved parent whose access rights have been violated may by pass the CA and the Convention and apply directly to the judicial authority of a Contracting State for relief under other applicable laws.

INTERNATIONAL ABDUCTION CONCURRENT RESOLUTION 293 --PASSED BY HOUSE WASHINGTON, D.C., May 23, 2000

House Concurrent Resolution 293, introduced by Congressman Nick Lampson (D, Tx-9), Founder and Chairman of the Congressional Missing and Exploited Children's Caucus, was passed 416-0 by the House on May 23rd, 2000. The concurrent resolution, which urges signatories of the Hague Convention on the Civil Aspects of International Child Abduction to uphold the agreement, was brought to the floor under suspension.

Resolution 293

Whereas the Department of State reports that at any given time there are 1,000 cases of American children either abducted from the United States or wrongfully retained in a foreign country;

Whereas many more cases of international child abductions are not reported to the Department of State;

Whereas the situation has worsened since 1993, when Congress estimated the number of American children abducted from the United States and wrongfully retained in foreign

countries to be more than 10,000;

Whereas Congress has recognized the gravity of international child abduction in enacting the International Parental Kidnapping Crime Act of 1993 (18 U.S.C. § 1204), and the Parental Kidnaping Prevention Act (28 U.S.C. § 1738a), and substantial reform and reporting requirements for the Department of State in the fiscal years 1998-1999 and 2000-2001 Foreign Relations Authorization Acts;

Whereas the United States became a contracting party in 1988 to the Hague Convention on the Civil Aspects of International Child Abduction (in this concurrent resolution referred to as the `Hague Convention') and adopted effective implementing legislation in the International Child Abduction Remedies Act (42 U.S.C. §§ 11601 *et seq.*);

Whereas the Hague Convention establishes mutual rights and duties between and among its contracting states to expedite the return of children to the state of their habitual residence, as well as to ensure the rights of custody and of access of the laws of one contracting state are effectively respected in the other contracting states, without consideration of the merits fo any underlying child custody dispute;

Whereas Article 13 of the Hague Convention provides a narrow exception to the requirement for prompt return of children, which exception releases the requested state from its obligation to return a child to the country of the child's habitual residence if it is established that there is a `grave risk' that the return would expose the child to `physical or psychological harm or otherwise place the child in an intolerable situation' or `if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [the child's] views';

Whereas the National Center for Missing and Exploited Children (NCMEC), the only institution of its kind, was established in the United States for the purpose of assisting parents in recovering their missing children;

Whereas Article 21 of the Hague Convention provides that the central authorities of all parties of the convention are obligated to cooperate with each other in order to promote the peaceful enjoyment of parental access rights and fulfillment of any conditions to which the exercise of such rights may be subject, and to remove as far as possible, all obstacles to the exercise of such rights;

Whereas some contracting states fail to order or enforce normal visitation rights of parents of abducted or wrongfully retained children who have not been returned under the terms of the Hague Convention; an

Whereas the routine invocation of the Article 13 exception, denial of parental visitation of children, and the failure by several contracting parties most notably Austria, Germany, Honduras, Mexico, and Sweden, to fully implement the Convention deprives the Hague Convention of the spirit of mutual confidence upon which its success depends: Now, therefore, be it Resolved by the House of Representative (the Senate concurring), That Congress urges--

1) all contracting parties to the Hague Convention, particularly European civil law countries that consistently violate the Hague Convention such as Austria, Germany, and Sweden, to comply fully with
both the letter and spirit of their international legal obligations under the Convention;

2) all contracting parties to the Hague

Convention to ensure their compliance with the Hague Convention by enacting effective implementing legislation and educating their judicial and law enforcement authorities;

3) all contracting parties to the Hague Convention to honor their commitments and return abducted or wrongfully retained children to their place of habitual residence without reaching the merits of any underlying custody dispute and ensure parental access rights by removing obstacles to the exercise of such rights;

4) the Secretary of State to disseminate to all Federal and State courts the Department of State's annual report to Congress on the Hague Convention compliance and related matters; and

5) each contracting party to the Hague Convention to further educate its central authority and law enforcement authorities regarding the Hague Convention, the severity of the problem of international abduction, and the need for immediate action when a parent of an abducted child seeks their assistance.

U.S. Senate Judiciary Committee Confirmation Proceedings of Nominee Justice John G. Roberts to position of Chief Justice of the United States Supreme Court, August 1, 2005.

Question 20, Party to Civil Legal or Administrative Proceeding:

State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil, legal or administrative proceeding, If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest.

Response: I am a named party in Rodriguez, et al. v.

Nat'l Ctr. For Missing & Exploited Children, et al., 03-cv-00120 (D.D.C. filed Jan. 27, 2003) *appeal docketed*, No. 055202 (D.C. Cir. May 23, 2005). I was added as a named defendant–along with eight other judges on the D.C. Circuit, Chief Justice Rehnquist, and several judges form other circuits–in plaintiff's First Amended Complain, filed on March 8, 2005. On March 31, 2005, the District Court of the District of Columbia dismissed the action with regard to the defendants in the original complaint, and ordered the amended complaint stricken. A notice of appeal was filed by Mr. Rodriguez on May 23, 2005. According to published judicial opinions in the matter, Mr. Rodriguez is a Virginia resident with ties to Colombia. He lived in Colombia for mush of the period between 1987 and 1999 and there fathered a child, Isidoro, in 1989. In 2001, Isidoro and his mother visited Mr. Rodriguez in Virginia. Hear the end of the visit, Mr. Rodriguez would not allow Isidoro to return to Colombia and filed a petition to modify custody in Fairfax County, Virginia court. Isidoro's mother answered with a suit in federal district court for the Eastern District of Virginia under the Hague Convention on the Civil Aspects of International Child Abduction; she won, and won again on appeal. Mr. Rodriguez now alleges a conspiracy on the part of numerous federal and private defendants to deprive him of his constitutional rights.

No. 05-1059

IN THE
SUPREME COURT OF THE UNITED STATES

ISIDORO RODRIGUEZ, AND ISIDORO RODRIGUEZ-HAZBUN,

Petitioners,

vs.

THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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SUPPLEMENTAL BRIEF

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PETITION FOR CERTIORARI FILED FEBRUARY 20, 2006

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DISCUSSION

Petitioners Isidoro Rodriguez ("Rodriguez-Father"), and Isidoro Rodriguez-Hazbun (Isidoro-Son), pursuant to S. Ct. Rule 15.8, files this supplemental brief in support of their pending petition for writ of certiorari.

Rodriguez-father and Isidoro-Son, brings to the Court's attention the decision issued this past Tuesday by the United States Court of Appeals for the Fourth Circuit in, *Sarah Claudia Aragon Canter vs. Andrew Cohen*, 4th Cir. No. 05-1609, March 21, 2006, regarding the limited jurisdiction of the federal courts and the mandate of securing visitation pursuant to the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.A. §§ 11601-11611 (West 2005), and the Hague Convention on the Civil Aspects of International Child Abduction ("Treaty"), Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501.

In *Canter*, a citizen of Israel filed an action in the federal court in Maryland seeking the enforcement of custody and visitation rights. The District Court dismissed the visitation claim for lack of jurisdiction. The Fourth Circuit affirmed, holding that the federal courts are of limited jurisdiction (A-12)[reference to the page of the 4th Cir. decision in the Appendix], and neither had jurisdiction under the Treaty or ICARA, to effect the merits of parental rights [*see also* discussion by dissent at (A-24)], nor did the federal courts have jurisdiction to consider a petition by one parent to secure visitation rights against another.

Directly on point to the issue before this Court, the Fourth Circuit held that to securing of visitation rights was the responsibility of the Central Authorities under the

Treaty. The Fourth Circuit stated,

> We note that our decision does not leave the Appellant without a remedy for the exercise of her access rights. The Convention does not prevent the Appellant from filing a claim for visitation in state court under the state's visitation law [citation omitted. Additionally, as discussed above, the Appellant may file a petition with the [Department of State and the National Center for Missing & Exploited Children ("Executive Branch")] pursuant to the Convention in order to address her access claims. (Emphasis added)(A-23)

As the record shows this was exactly what Isidoro-Son and Rodriguez-Father have sought to do since January 27, 2003:

first, by seeking the issuance of a writ of mandamus to the Executive Branch to compel their compliance with their ministerial duty under Article 2, 11, 19, 20, 21, and 29 of the Treaty, 42 U.S.C. § 11601(a) & § 11602(1) and (7) of ICARA; as well as the Congress's Joint Concurrent Resolution 293 of May 23, 2000; and,

second, pursuant to VA Code § 20-146.25, .29, and .35 of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), as well as the Treaty and ICARA, by filing petitions with the Virginia Courts to secure visitations.

However, in response the Executive Branch, as well as both the Federal and Virginia Courts, for the past three years have denied that the mandates of Congress

and the General Assembly of Virginia to secure visitation existed. For example;

o Respondent-Defendants Stephen John Cullen and Miles & Stockbridge who argued in *Canter* that the federal courts were to secure visitation, are the same Defendants in this action who for three years have argued to both the federal courts and the Virginia Court that the right to secure visitation does not exist;

o Judge Richard Roberts held that the NCMEC was only a non-profit, and not the independent contractor "instrumentality of government," responsible to secure visitation. *But See Cantor*, [the Fourth Circuit noted this relationship of the Executive Branch (A-9)].

o Judge Richard Roberts and the Virginia Courts stripping that Rodriguez-Father of his rights based on Judge T.S. Ellis III ordering Isidoro-Son returned to the Republic of Colombia.

On this latter point, relevant to Rodriguez-Father and Isidoro-Son efforts for the past three years to secure visitation subsequent to Judge Ellis III order, the Fourth Circuit confirmed that it was the District Court duty to "craft a remedy **within the context of the Convention**" to ensure the exercising of visitation rights. (emphasis in the order)(A-20).

Thus Isidoro-Son and Rodriguez-Father have been repeatedly deprived for over three years of their rights to visitation in violation of 18 U.S.C. §§ 4, 371, 1001, and 1204, these governmental entities, employees, agents, attorneys, have obstructed with Rodriguez-Father's parental rights.

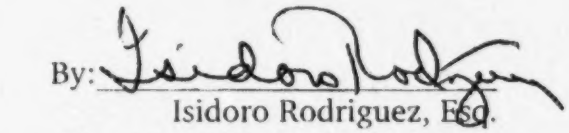
CONCLUSION AND RELIEF SOUGHT

Based on the analysis in *Canter*, it is clear that since his being shanghaied to Colombia on June 11, 2002,for over three years Rodriguez-father and Isidoro-son have been illegally denied their right to visitation under a Joint Custody Settlement Agreement entered in August 1997, in violation of the Treaty, ICARA, and VA Code. Furthermore, based on the analysis in *Canter* the Executive Branch and Judicial Branches of Federal Government, and the Virginia Courts, have acted outside of their jurisdiction, as well as judicial and ministerial capacity.

In summary, because it is alleged that due to on going malfeasance in office there have been violations of 18 U.S.C. § 4, § 371, and §1001, by the obstruction with Rodriguez-father parental rights in violation of 18 U.S.C. § 1204, this Court must grant certiorari.

Dated: March 26, 2006

Respectfully submitted,

By: 

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OPINION

HARWELL, District Judge:

This appeal presents the question of whether the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610, confers jurisdiction upon federal courts to hear access claims.[1] Petitioner-Appellant, Sarah Claudia Aragon Cantor, appeals the district court's order of April 18, 2005, dismissing her access claims. On May 23, 2005, the district court granted Ms. Cantor's motion for final judgment pursuant to Fed.R.Civ.P. 54(b) on the access claims and for clarification of ruling on the alternative access claim for one of her children referred to herein as A.C. Specifically, when dismissing the access claims, the district court held that it did not have jurisdiction to hear access claims under ICARA. For the following reasons, we affirm the decision of the district court.

I.

Ms. Cantor and Mr. Cohen married in [illegible]. At the time of the marriage, Ms. Cantor and Mr. [illegible] in Israel. During the marriage the couple had four children, R.C., A.C. (the girls), I.C., and Y.C. (the boys), the latter

[1] Under ICARA, the term "rights of access" means visitation rights. 42 U.S.C. § 11602(7).

three of whom are the subject of this appeal.[2] On July 16, 1998, the couple divorced in an Israeli Rabbinical Court and a divorce decree was issued. The divorce decree provided that Mr. Cohen would receive custody of A.C. and I.C., the two oldest children, and Ms. Cantor would retain custody of Y.C. and R.C., the two younger children. The divorce decree also granted visitation rights to Ms. Cantor.

Subsequent to the divorce decree, Ms. Cantor and Mr. Cohen discussed the possibility of the girls being placed with their mother and the boys with their father. Pursuant to this discussion, on September 7, 1998, Ms. Cantor relinquished custody of Y.C. to Mr. Cohen and took custody of A.C. In June 1999, Ms. Cantor filed suit in the Israeli Rabbinical Court, seeking changes to the first divorce decree. In July 1999, Mr. Cohen was ordained as a Rabbi and joined the United States Air Force Chaplaincy. Mr. Cohen was scheduled to attend training school in the United States. On January 2, 2000, a second divorce decree was issued by the Rabbinical Court. The second divorce decree formalized the living situation of the children that Ms. Cantor and Mr. Cohen had earlier agreed upon by granting Ms. Cantor custody of the girls, A.C. and R.C., and granting Mr. Cohen custody of the boys, I.C. and Y.C. The decree provided that Ms. Cantor would have temporary custody of the two boys while Mr. Cohen attended training school (from approximately January 2000 until September 2000).

On July 9, 2002, a third divorce decree was issued by the Rabbinical Court. The third divorce decree provided

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[2]A review of the background information in this matter reveals no less than three orders issued by the Israeli Rabbinical Court which involve the children.

that Ms. Cantor would retain custody over the two girls, and that Mr. Cohen would retain custody over the two boys. The third divorce decree also provided that the two boys and A.C. would live with Mr. Cohen in Germany, where he was stationed with the United States Air Force at the time. The third divorce decree refers to A.C.'s stay in Germany as an "extended visit." The third divorce decree also obligates Mr. Cohen to finance half of the cost of Ms. Cantor's visits to Y.C., I.C., and A.C. in Germany, which were to occur every two months. It also instructed Mr. Cohen to enable the children to call Ms. Cantor three times a week, and to bring the children to Israel to visit Ms. Cantor at least twice a year. This divorce decree attributes the changed custody situation to the security issues in Israel, the educational needs of A.C., and the neurological and the psychological needs of Y.C. However, the decree does not surrender custody of A.C. to Mr. Cohen, nor does it provide a date for A.C.'s permanent return to Israel.

In December 2002, Ms. Cantor and Mr. Cohen had discussions about R.C.'s situation in Israel. Specifically, Ms. Cantor told Mr. Cohen that R.C. missed her siblings and that neither R.C. nor Ms. Cantor liked the school R.C. was attending. As a result, Ms. Cantor and Mr. Cohen agreed that R.C. would move to Germany to live with Mr. Cohen. There is a disagreement among the parties as to when R.C. was to return to Israel.

On March 2, 2004, Mr. Cohen was assigned a brief duty in Qatar and was told to report to the United States upon completion of this duty. On April 17, 2004, Mr. Cohen completed his duty and reported to the United States. Mr. Cohen initially resided with his four children in Pittsburgh, Pennsylvania. On July 11, 2004, all four children moved with Mr. Cohen to Silver Spring, Maryland. Ms. Cantor continues to live in Israel.

On October 22, 2004, Ms. Cantor filed a verified petition in the United States District Court for the District of Maryland for return of the children and access to the children. On November 12, 2004, Mr. Cohen filed a motion to dismiss. On April 18, 2005, the district court found that it lacked jurisdiction to hear Ms. Cantor's access claims and dismissed the complaint insofar as it requests access to I.C. and Y.C. On April 26, 2005, Ms. Cantor filed a motion for final judgment pursuant to Fed.R.Civ.P. 54(b) on the access claims and for clarification of the district court's ruling on the access claim for A.C. On May 18, 2005, Ms. Cantor timely appealed the district court's decision dismissing the access claims. On May 23, 2005, the district court granted Ms. Cantor's motion and certified that its decision dismissing all of the access claims, including the access claim as to A.C., was a final judgment.

II.

The district court found as a matter of law that it lacked jurisdiction to hear the access claims and dismissed those claims. Regardless of whether the dismissal is considered to have been entered under Fed.R.Civ.P. 12(b)(6) or Fed.R.Civ.P. 12(b)(1), we review the decision de novo. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997).

The district court's Fed.R.Civ.P. 54(b) certification is subject to an abuse of discretion standard. *See Curtis-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10 (1980); *see also Braswell Shipyards, Inc. v. Beazer East, Inc.*, 2 F.3d 1331, 1339 (4th Cir. 1993) (Luttig, J. dissenting) ("[w]e may disturb a trial court's decision to enter judgment under Federal Rule of Civil Procedure 54(b) 'only if [we] can say that its conclusion was clearly unreasonable.'") (quoting *Curtis-Wright*, 446 U.S. at 10). We find the district court's

decision to enter judgment under Fed.R.Civ.P. 54(b) in this case was reasonable and not an abuse of discretion. Accordingly, we possess jurisdiction and will review the Appellant's claims on the merits.

As stated above, this appeal presents the question of whether federal courts are authorized to hear access claims under ICARA. ICARA is the federal legislation which implemented the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, 19 I.L.M. 1501 (1980) (the "Hague Convention" or "Convention") in the United States.

The Appellant argues the plain language of § 11603(b) of ICARA confers jurisdiction to federal courts to hear access claims. Specifically, § 11603(b) states:

> [a]ny person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

42 U.S.C. § 11603(b).

The Appellant argues this section of the statute unambiguously allows "judicial proceedings" to secure the "effective exercise of rights of access to a child" through "a civil action." *Id.* In support of this argument, the Appellant points out that 42 U.S.C. § 11603(e) establishes a burden of proof with regard to rights of access. The Appellant also notes that 42 U.S.C. § 11603(a) states that the "courts of

the States and United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."

To resolve the issue presented in this appeal we find that we must begin by looking at the implementing language in ICARA, 42 U.S.C. § 11601, *et seq*. We believe the analysis does not begin at 42 U.S.C. § 11603, as suggested by the Appellant, but instead at 42 U.S.C. § 11601. In the initial findings under § 11601(a) particular emphasis is drawn to Congressional concern regarding international abduction or wrongful retention of children. Notably, this section does not mention visitation rights or access rights until the last subsection, subsection 4, and then only mentions these rights in the context of the Convention. Specifically, the subsection describes that "**[t]he Convention** . . . establishes legal rights and procedures for the prompt return of the children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights." 42 U.S.C. § 11601(a)(4) (emphasis added).

Furthermore, subsection (b)(1) of § 11601, which is part of Congress' declarations, states that "[i]t is the **purpose** of this chapter to establish procedures for the **implementation of the Convention** in the United States." 42 U.S.C. § 11601(b)(1) (emphasis added). More importantly, subsection (b)(4) of § 11601, which is also part of Congress' declarations, states that:

> *[t]he Convention and this chapter **empower courts in the United States to determine only rights under the Convention*** and not the merits of any underlying child custody claims.

42 U.S.C. § 11601(b)(4) (emphasis added).